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No. 08-1043

In The Supreme Court of the United States

VALERIE PLAME WILSON; JOSEPH C. WILSON, IV,

Petitioners,

v.

I. LEWIS LIBBY, JR.; KARL C. ROVE, RICHARD B. CHENEY; RICHARD L. ARMITAGE; JOHN DOES 1-9

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

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This Court Should Grant Review To Resolve An Issue Of National Importance That Has Divided The Lower Courts Concerning What Is Sufficient To Constitute "Special Factors Counseling Hesitation" Precluding Constitutional Claims For Damages Pursuant To *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*

Federal courts across the country regularly confront the question of when to deem a federal statute a comprehensive enforcement mechanism sufficient to be a "special factor counseling hesitation" precluding a cause of action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court last addressed this question over 20 years ago in *Schweiker v. Chilicky*, 487 U.S. 412 (1988). Since then, significant confusion has developed in the circuit and district courts over which statutes preclude *Bivens* suits and under what circumstances.

This is an issue of great national importance because for individuals, like the plaintiffs in this case, "it is damages or nothing." *Bivens*, 403 U.S. at 409-10 (Harlan, J., concurring). The preclusion of a *Bivens* remedy means that seriously injured individuals are not compensated and the deterrent effect of liability is lost. Government accountability is immeasurably harmed if serious constitutional violations cannot be challenged and redressed.

This case presents the ideal vehicle to clarify when there are special factors counseling hesitation

precluding a *Bivens* action. It involves an egregious abuse of power by those at the highest levels of government -- Vice President Dick Cheney, I. Lewis Libby, Jr., Karl Rove, and Richard Armitage -- that destroyed the career of a secret operative for the Central Intelligence Agency and placed her and her family in grave danger. The Amended Complaint seeks recovery via a *Bivens* action against these defendants for violations of freedom of speech under the First Amendment, invasion of privacy under the due process clause of the Fifth Amendment, and the deprivation of property without due process under the Fifth Amendment.

Both the United States and the individual defendants stress this Court has cautioned against extending the *Bivens* remedy "into new contexts." Brief for the United States in Opposition [hereafter, "U.S. Opp."] at 10; Brief of Individual Respondents in Opposition [hereafter, "Individuals Opp."] at 3 (quoting *Ashcroft v. Iqbal*, No. 07-1015 (May 18, 2009), slip op. at 11, "the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants.") The defendants then attempt to characterize the plaintiffs as seeking a "new *Bivens* cause of action." U.S. Opp. at 16.

In fact, the plaintiffs do not seek to extend *Bivens* liability to a new context or a new category of defendants. It is well-established that *Bivens* actions exist under the First and Fifth Amendments. *See, e.g., Bush v. Lucas*, 462 U.S. 367 (1983) (First Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment). Likewise, this action is against individual federal officials who clearly are subject to

Bivens liability. Thus, the question is not whether *Bivens* should be extended, but whether it should be precluded by a statute that offers no remedy and by an unsubstantiated fear that some of the claims could -- at some point in the litigation -- perhaps involve some form of sensitive information.

A. Can A Statute That Does Not Apply And Can Provide No Remedy Be A Special Factor Counseling Hesitation?

The court of appeals concluded the Privacy Act, 5 U.S.C. § 552a, precludes the plaintiffs' constitutional claims under *Bivens*. There is no dispute, however, that the Privacy Act provides no remedy at all to one of the plaintiffs, Joseph Wilson, and only a remedy for one claim against one of the four defendants to the other plaintiff, Valerie Plame Wilson.

The Oppositions of the United States and the individual defendants raise three questions. 1) If there is no *Bivens* action, do the plaintiffs have any remedy? 2) Should the Privacy Act be viewed as a comprehensive statute precluding all *Bivens* claims? 3) Is there disagreement among the lower courts as to when a federal statute should be regarded as a special factor counseling hesitation and thus a bar to a *Bivens* suit?

First, contrary to the defendants' assertions, for the plaintiffs in this case it is *Bivens* or nothing. Thus, this case clearly presents to the Court the

important question of whether statutes that provide no remedy can bar *Bivens* actions.

The Privacy Act offers Joseph Wilson no remedy because it provides a remedy only for the person whose records have been released; it has no application when the records of some other person are involved. *Sussman v. U.S. Marshals*, 494 F.3d 1106, 1123 (D.C. Cir. 2007). Nevertheless, the United States contends this case is a "poor vehicle" to address the issue "because petitioners may not have carried their burden of establishing Mr. Wilson's Article III standing to assert that claim." U.S. Opp. at 17.

Contrary to the government's argument, the Amended Complaint expressly states that the four defendants acted in concert to punish Mr. Wilson for his speech critical of President Bush's State of the Union address. *See, e.g.*, Amended Complaint, at ¶¶19, 30, 36. The Amended Complaint specifically alleges the actions of these four defendants led directly to the revelation of Valerie Plame Wilson's identity as a secret operative and destroyed her career.

According to the United States, however, "in the absence of factual allegations that Mr. Wilson's alleged injury from the public disclosure of his wife's CIA employment is 'fairly traceable' to alleged conduct by Cheney, Rove, or Libby, petitions have failed to establish Article III jurisdiction over Mr. Wilson's First Amendment claim." U.S. Opp. at 17-18. But that is exactly what the Amended Complaint alleges. The United States offers an

alternative theory that Richard Armitage's actions caused Robert Novak to write a column disclosing Mrs. Wilson's status as a secret CIA operative leaving the other three defendants not responsible for the Wilsons' injuries. U.S. Opposition at 17.

This revisionist account (which plaintiffs dispute) is an issue for trial, not a basis for granting a motion to dismiss. The plaintiffs' Amended Complaint could not be clearer or more explicit in alleging each defendant engaged in a concerted effort to punish Mr. Wilson for his speech and each did so by destroying Mrs. Wilson's career as a secret operative for the CIA. The Amended Complaint alleges this caused great harm to the plaintiffs, which establishes Mr. Wilson's standing under the First Amendment. Moreover, crucial to the petition for certiorari is the defendants' tacit admission that the Privacy Act provides absolutely no remedy for the violation of Mr. Wilson's First Amendment rights.

Neither does the Privacy Act offer much of a remedy to Mrs. Wilson. It is well-established that the Offices of the President and Vice President cannot be sued under the Privacy Act. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 55 (D.D.C. 2002); *Jones v. Executive Office of President*, 167 F. Supp. 2d 10, 18 (D.D.C. 2001); *Dale v. Executive Office of President*, 164 F. Supp. 2d 22, 26 (D.D.C. 2001). Thus, Mrs. Wilson has no claim under the Privacy Act against defendants Cheney, Libby, and Rove and she has only one potential Privacy Act

claim against defendant Armitage for invasion of privacy.

The defendants claim the existence of a partial remedy for one claim against one defendant demonstrates a *Bivens* remedy is unnecessary. U.S. Opp. at 13; Individuals Opp. at 5. Despite the defendants' contention, no court ever has held a *Bivens* action is precluded because one of two plaintiffs has a potential claim for one of several causes of action under a statute. This case provides this Court with the opportunity to explain what is sufficient to preclude a *Bivens* remedy.

Second, this Court should determine whether the Privacy Act constitutes a special factor counseling hesitation. This Court should resolve this question to clarify the circumstances under which a federal statute precludes a *Bivens* cause of action.

The defendants read the exclusion of the offices of the President and Vice President from remedies under the Privacy Act as a deliberate decision by Congress to shield these offices from liability for invasion of privacy. U.S. Opp. at 11-12. Nothing in the legislative history of the Privacy Act, however, supports this view. The Privacy Act created new rights for individuals with regard to information held by the government and imposed additional burdens on the government. The exclusion of the offices of the President and Vice President from these new statutory rights and burdens does not evidence congressional intent to preclude other remedies for invasion of privacy. As

Judge Rogers, in her dissenting opinion in the D.C. Circuit, concluded: "In any event, the legislative history demonstrates that the Privacy Act was designed to add protection, not to eliminate existing remedies or those that might be developed by the courts. See, e.g., S. Rep. No. 93-1183, at 2-3, 16, Source Book on Privacy at 155-56, 169; H.R. Rep. No. 93-1416 at 3 (1974), Source Book on Privacy at 296; 120 Cong. Rec. 40,410 (1974) (statement of Sen. Muskie)." Rogers, J., concurring in part and dissenting in part, App. at 40a-41a (citations omitted).

This, of course, is the issue to be resolved by this Court: Should the Privacy Act be regarded as a special factor counseling hesitation? More generally, when should a statute that provides no remedy be deemed to preclude *Bivens* claims?

Third, this issue has generated considerable confusion in the courts and this Court should provide clarification. Both the United States and the individual defendants fail to address the fact that every Supreme Court case precluding a *Bivens* action based on the existence of a "comprehensive remedial scheme" involved a comprehensive statute that provided some potential remedy for the plaintiffs. In *Bush v. Lucas*, 462 U.S. 367 (1983), this Court found there were adequate remedies available under the civil service process to preclude a *Bivens* suit by a federal employee arising from an adverse employment action. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), this Court concluded there were sufficient remedies under the Social Security Act to preclude a *Bivens* suit for wrongful

termination of disability benefits. In *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), this Court found that outside of the *Bivens* context the plaintiff "had an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints." 127 S. Ct. at 2600. This Court also has made clear this alternative remedy must be "equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

No prior case of this Court has dealt with a situation like that presented here where no alternative remedy exists. Lower courts have reached conflicting decisions as to when the existence of a federal statute is a special factor counseling hesitation precluding a *Bivens* action. In the petition for a writ of certiorari, plaintiffs identified varying approaches the circuits have taken for determining when a federal law precludes a *Bivens* cause of action. The United States argues these cases "reflect the context-specific nature of the 'special factors' inquiry which turns on a careful examination of the applicable statutes and claims." U.S. Opp. at 19.

This misses the point. In fact, when engaging in the "context-specific inquiry," lower courts disagree over how to determine when a federal law bars a *Bivens* action. Although the question arises in many different contexts, the issue is the same. The United States discusses one example: whether the Immigration and Nationality Act precludes a *Bivens* action. U.S. Opp. at 19. The very cases the government cites are split over whether this Act is a special factor counseling hesitation. *Arar v. Ashcroft*, 532 F.3d 157, 176-184 (2d Cir. 2008), *reh'g*

en banc granted (argued December 9, 2008), *Van Dinh v. Reno*, 197 F.3d 427, 432-435 (10th Cir. 1999) (barring a *Bivens* action); *Castaneda v. United States*, 546 F.3d 682 (9th Cir. 2008) (*Bivens* action not barred). This case presents an excellent vehicle for clarifying this enormously important issue.

B. Can Speculation About Possible Disclosure Of Confidential Information Warrant Granting A Motion To Dismiss?

The defendants also argue it was appropriate to bar a *Bivens* action because adjudication of the claims "would require judicial intrusion into matters of national security and sensitive intelligence information." U.S. Opp. at 20; Individuals Opp. at 5-6.[1]

This argument, however, rests entirely on speculation. A great deal of information already is public concerning what occurred, especially as a result of the criminal trial of defendant I. Lewis Libby, Jr. The public information very well may be sufficient to establish all of the elements of the plaintiffs' case. Some of the claims, such as Mr. Wilson's First Amendment claim, are unlikely to require any confidential information. Publicly available information shows the defendants acted in

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[1] While the individual defendants also cite to other grounds raised in their motions to dismiss, Individuals Opp. at 7, neither the district court nor the court of appeals addressed those grounds. None are jurisdictional, none are reasons for denying the writ of certiorari, and none are relevant to the issue presented here of when there are special factors counseling hesitation precluding a *Bivens* cause of action.

concert to punish Mr. Wilson by revealing that his wife was a secret operative, thereby ruining her career. At most, perhaps some claim might involve some sensitive information at some time in the litigation. There is no reason to believe, however, that sensitive information cannot be protected without dismissing all of the claims by both plaintiffs against all of the defendants.

The United States responds that the court of appeals and the district court found the speculative risk of disclosing confidential information to be a special factor counseling hesitation and that the "context-specific appraisal of the risks and potential intrusions associated with litigating petitioners' claims does not warrant further review by this Court." U.S. Opp. at 21. Quite the contrary: that is precisely what makes Supreme Court review appropriate and necessary here. The question of what is a basis for a special factor counseling hesitation precluding a *Bivens* action repeatedly arises and requires resolution. In addition, is speculation regarding the possible release of sensitive information, before a single discovery request has been made and where there has been so much information already revealed by the media and during a public trial, enough to preclude a *Bivens* claim? These questions need to be resolved by this Court.

CONCLUSION

This Court should grant certiorari to clarify what constitutes "special factors counseling hesitation" under *Bivens*.

Respectfully submitted,

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